

KARAGANIS, WHITE & MAGEL LTD.

ATTORNEYS AT LAW

414 NORTH ORLEANS STREET - SUITE 810

CHICAGO, ILLINOIS 60610

TELEPHONE

(312) 836-1177

TELEFAX

(312) 836-9083

JOSEPH V. KARAGANIS

A. BRUCE WHITE

BARBARA ANNE MAGEL

MARK D. ERZEN

JOHN W. KALICH

CHRISTOPHER W. NEWCOMB

WRITER'S DIRECT DIAL:

(312) 836-1177 EXT. 150

WRITER'S E-MAIL:

BWHITE@K-W.COM

September 19, 2003

**Via Telefax (312.353.8414)
and First Class Mail**

Mazin Enwiya
Remedial Project Manager Company
United States Environmental Protection
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

EPA Region 5 Records Ctr.



265633

**Re: Ellsworth Industrial Park, Downers Grove, Illinois
Order No. V-W-03-C-751**

Dear Mr. Enwiya:

We have received your letter dated September 11, 2003, which approves the "Agreement Among the Village of Downers Grove, DuPage County and Certain Participating Companies" (the "Three Party Agreement"), subject to the condition that paragraph 11 of the Three Party Agreement be modified as prescribed by USEPA. Copies of your letter were provided to all of the participating parties that signed the AOC, and we have been authorized to submit this response on their behalf.

It is our understanding that the Three Party Agreement has been available to U.S.EPA since at least the first week of July 2003, when it was put on the Agendas for DuPage County and Village of Downers Grove approval and made available to the general public for review and comment. It is our further understanding that USEPA had no comment on the Three Party Agreement prior to or at the time it was approved by both the Village and County on or about July 12, 2003, or at any time thereafter until the Three Party Agreement, AIP and AOC had been finalized and signed by all parties, and the governmental parties

convened a public meeting to discuss the process for implementing the hookups. For the first time, at that public meeting on August 13, 2003, some members of the public objected to certain of the provisions of the Water Services Agreement attached as an Exhibit to the already fully executed Three Party Agreement; and it was only thereafter that U.S.EPA took issue with the provisions of paragraph 11 of the Three Party Agreement.

It is the position of the participating parties that USEPA does not have authority under paragraph 14 of the AOC to require modification of the final executed Three Party Agreement, including without limitation the provisions of paragraph 11 of the WSA. In order to properly exercise its authority under paragraph 14 of the AOC, U.S.EPA was required to comment on the Three Party Agreement while it was still in draft, and certainly before it had been signed by all of the parties.

Even if U.S.EPA's comments had been timely, these types of changes are not within the scope of the authority afforded by paragraph 14 of the AOC. It is undisputed that the Three Party Agreement provides that all existing residents in the area designated in Attachment C to the AOC shall be hooked up to public water as expeditiously as practicable, and no later than December 2005. Nothing in U.S.EPA's September 11, 2003 letter asserts that the Three Party Agreement fails to meet this criteria set forth in paragraph 14.c. of the AOC. Absent, such a shortcoming, it is beyond the authority of U.S.EPA afforded by the AOC to require changes to the Three Party Agreement.

In addition, by waiting to demand changes until after the participating parties' execution of the Three Party Agreement, and execution of all of the other related documents (i.e., the AIP and the AOC) in reliance on the terms of the Three Party Agreement, the U.S.EPA is depriving the participating parties of the benefit of the bargain they negotiated at arms length. Such unilateral *post hoc* re-writing of the basic terms was not contemplated by the AOC and unreasonably and arbitrarily interferes with the contractual rights of the parties to the Three Party Agreement.

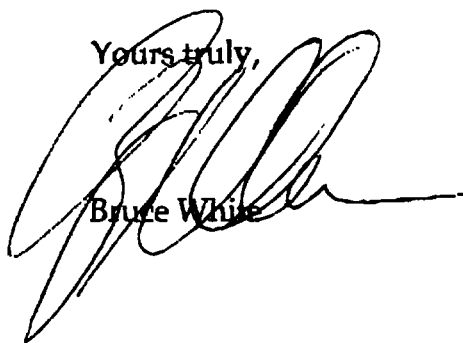
We continue to believe that the original form of paragraph 11 of the WSA is fully consistent with the parties' understanding of the scope of the waivers and releases contemplated by the AOC, and that we would be successful if we pursued dispute resolution of these issues on any of the grounds outlined above. At the same time, the participating parties are as committed as the U.S.EPA to implementation of the hookups as expeditiously as practicable. Consequently, notwithstanding our sincere belief in our right to rely on the negotiated terms of paragraph 11 of the WSA, and our deep reservations regarding any changes, we will not commence dispute resolution regarding the revised language in U.S.EPA's letter.

Nothing in this letter shall be construed as our voluntary acceptance of or agreement with the language changes set forth in U.S.EPA's September 11, 2003

letter, or as a waiver of any of the grounds for our objections to that language. While we will not stand in the way of the revisions to the WSA by the Village and County to incorporate the U.S.EPA language in this instance, we expressly reserve any and all defenses we may have to any claims by third parties, including the defense that any such claims are within the scope of the waivers and releases contemplated by the AOC. We further reserve any and all rights we may have to object and commence dispute resolution if any further changes are proposed to the Three Party Agreement or WSA by USEPA, and we fully intend to exercise such rights.

If you have any questions regarding this response, please direct them to the undersigned.

Yours truly,

A handwritten signature in black ink, appearing to read "Bruce White", written over the typed name.

Bruce White

cc:

Thomas Krueger, Esq. (via Fax)
Participating Parties (via Fax)
(per attached service list)

BW:sm
091608.DOC

KARAGANIS, WHITE & MAGEL LTD.

414 NORTH ORLEANS
CHICAGO, ILLINOIS 60610

| | |
|-------------------------------------|-------------------------------|
| <input type="checkbox"/> | Original to Follow |
| <input checked="" type="checkbox"/> | Original <u>Not</u> to Follow |

WRITER'S DIRECT DIAL:
(312) 836-1177 EXT. 150

WRITER'S E-MAIL:
JWHITE@K-W.COM

TELEFAX COVER SHEET

DATE: 09/19/03

OPERATOR: Susan

TO: Mazin Enwiya 312-353-8414

cc: Thomas Krueger 312-886-0747

cc: Participating Parties (via attached fax service list)

FROM: Bruce White _____

Total Number of Pages (Including This Cover Letter): 5

If you do not receive all of the pages indicated, please contact Susan at (312) 836-1177 Ext. 147. To reply via telefax, please dial (312) 836-9083.

MESSAGES: Please see attached.

****CONFIDENTIALITY NOTE****

The documents accompanying this facsimile transmission contain information from the law offices of KARAGANIS, WHITE & MAGEL, LTD. which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this faxed information is strictly prohibited, and that the documents should be returned to this office immediately. In this regard, if you have received this facsimile in error, please notify this law office by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

KARAGANIS, WHITE & MAGEL LTD.414 NORTH ORLEANS
CHICAGO, ILLINOIS 60610
☐ Original to Follow
☒ Original Not to Follow
WRITER'S DIRECT DIAL:
(312) 836-1177 EXT. 150WRITER'S E-MAIL:
BWhite@K-W.COM**TELEFAX COVER SHEET****DATE:** September 19, 2003 **OPERATOR:** Susan

TO: Pamela Hanebutt (312) 692-1718
 Linda Kurtos (708) 524-2047
 Michael Maher (312) 321-0990
 Terry Piper (847) 455-1341
 Raymond Luchetti
 Larry Brenman (312) 621-1750
 Todd Wiener (312) 984-2098
 Mark Bilut
 Carol Douglas (312) 977-4405
 Pat Rooney
 Larry Franczyk (630) 969-0310
 Joseph Strubbe (312) 609-5005
 Edward Walsh (312) 207-6400
 Brett Heinrich (312) 474-7898
 John Loseman (312) 580-1201
 Carey Rosemarin (312) 896-5786
 Dana Floyd (312) 466-1186
 Gary Rovner (312) 645-0141
 Bill Dickett (312) 853-7036
 Alan Bielawski

FROM: Bruce White**Total Number of Pages (Including This Cover Letter):** 5

If you do not receive all of the pages indicated, please contact Susan Moody at (312) 836-1177 Ext. 147. To reply via telefax, please dial (312) 836-9083.

MESSAGES: Please `see attached.******CONFIDENTIALITY NOTE******

The documents accompanying this facsimile transmission contain information from the law offices of KARAGANIS, WHITE & MAGEL, LTD. which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this faxed information is strictly prohibited, and that the documents should be returned to this office immediately. In this regard, if you have received this facsimile in error, please notify this law office by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.